be classified under heading 10.04 of the Common Customs Tariff if the quantity of broken-off tips is not negligible in relation to that of the clipped grains.

3. **Oat grains which have merely been clipped must be classified under subheading 11.02 B I (a) 2 (aa); oat grains which have undergone more extensive hulling must be classified under subheading 11.02 B I (a) 2 (bb).**

Bosco O'Keeffe Koopmans

Delivered in open court in Luxembourg on 1 July 1982.

J. A. Pompe
Deputy Registrar

G. Bosco
President of the First Chamber

OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 1 APRIL 1982 [1]

Mr President,
Members of the Court,

These two references for a preliminary ruling, which were joined by order of the Court of 16 September 1981, were submitted by the Tariefcommissie (administrative court of last instance in revenue matters) and seek an interpretation of the Common Customs Tariff in order to ensure the correct classification of oat grains.

The facts are as follows:

The Netherlands company Palte & Haentjes BV imported into the Netherlands in April 1977 on behalf of two German undertakings two consignments of oats originating in Australia, the classification of which has given rise to a dispute between an importer (heading 10.04) and the customs administration (subheading 11.02 B I (a) 2 (aa)).

According to the Explanatory Notes to the Customs Cooperation Council Nomenclature, there are two principal varieties of oats: grey (or black) oats and white (or yellow) oats. In both varieties,

1 — Translated from the French.

the oat grains often retain their husk, even after threshing.

They also have tips. In order to facilitate ingestion by livestock (and also, in particular, by poultry), they are "clipped" by removal of the extremities.

Mere threshing (or winnowing) is not normally sufficient to clip the oats, since the tips form part of the pericarp and even partial removal of the pericarp requires a milling process.

In order to clip oats therefore it is necessary to subject them to further treatment, namely hulling, which is defined in the Explanatory Notes on barley (10.03) as "a milling process".

From the foregoing the following conclusions are drawn in the Common Customs Tariff:

Grains of cereals which have not been hulled or otherwise worked are classified in Chapter 10. The above-mentioned Explanatory Notes state that the procedure in that chapter may be in sheaves, in the ear, *simply* threshed or winnowed. Even after such threshing or winnowing, the tips still adhere to the oat grains. They are, in short, "unprocessed" cereals, as they appear after ordinary harvesting operations. Oats which display these features (10.04) are subject to a levy of 13%.

On the other hand, *hulled* grains (shelled or husked) of *clipped* oats, whether or not sliced or kibbled, fall within heading 11.02 B I (a) 2 (aa). This further processing gives rise to the charging of a higher levy (23%).

It may on occasion happen that, after threshing and other handling operations (storage, loading, transport), the tips of the grains break off naturally, without the need for recourse to milling.

The main proceedings are concerned with a borderline case of this kind. The importer considers that the oats which it produced to the customs authorities fall within heading 10.04; the customs authorities on the other hand consider that the relevant heading is 11.02 B I (a) 2 (aa). According to the decision making the reference pronounced by the Netherlands court before which the actions are pending, the product whose classification is at issue is made up of oat grains which have been merely threshed, although some of them have lost their tips as a result of the handling operations to which they have been subjected. As regards the proportions involved, the order making the reference merely indicates that the consignments in question contain a large number of clipped grains, without specifying the percentage, grains still bearing their tips and, finally, tips broken off from the grains.

In order to settle the two cases before it, the national court has submitted the following questions:

"1. Should oat grains which after being harvested are simply threshed, stored, loaded and transported, as a result of which the tips are broken off, be classified in heading 10.04 of the Common Customs Tariff or in subheading B I (a) 2 (aa) of heading 11.02?

2. If this product described in Question 1 should be classified in subheading B 1 (a) 2 (aa) of heading 11.02, does there then apply to such a consignment of oat grains, consisting partly of clipped and partly of unclipped grains, a percentage of clipped grains above which the

consignment must be classified in subheading B I (a) 2 (aa) of heading 11.02 and below which it must be classified in heading 10.04? Does the fact that there are broken-off tips in the consignment have any effect on classification?

3. If it is assumed that the hulling of oat grains results in the grains being clipped as well because the husk or seed-coat, of which the tips form part, is removed in hulling, how should the two further subdivisions of subheading B I (a) 2 of heading 11.02, Hulled oats, namely "(aa) Clipped oats" and "(bb) Other", then be defined in relation to one another?"

1. The decisive factor for classification of the goods in question seems to me to be the presence of tips in the imported consignments, regardless of whether the tips are still attached to the grains or have been broken off.

In fact, if the grains had had their tips removed as a result of hulling, they would probably have been removed from the consignments in question, since it would be pointless to transport residues or waste of such low value at great cost over a great distance.

In the present case, it may be inferred from the presence of tips still mixed with the grains that the tips were not removed deliberately, that their removal is not the result of hulling or other processing and that it was unintentional and incidental. This reasoning is confirmed by the fact that the consignments include, in addition to broken-off tips, grains which still bear their tips. Normally therefore a further operation would have to be carried out (albeit a relatively simple one, since it is similar to winnowing) in order to remove the tips from the grains.

The Commission explains that the oats in question probably lost a large proportion of their tips during harvesting by means of advanced combine harvesters, allowing an operation to be carried out which was not contemplated by the Common Customs Tariff at the time of importation. But that does not mean that the grains have undergone any processing other than threshing or winnowing, the only consideration which, in the circumstances, must be regarded as relevant.

The Commission further states that the Explanatory Notes to the *Common Customs Tariff* relating to subheading 11.02 B I (a) 2 (aa) were amended in November 1980 so as to include "oat grains which have only been threshed after harvesting and, although retaining their husks or bract, have had their tips broken off".

The Explanatory Notes to the Common Customs Tariff of the European Communities — which should not be confused with the "Notes" or " Additional Notes" to the table of duties (second part of the Annex to the regulation on the Common Customs Tariff) — are, according to the case-law of the Court (paragraph 13 of the decision of 4 October 1979 in *Cleton* [1979] ECR 3069, at p. 3080), merely a means of interpretation of an administrative nature; they are not intended to replace the Explanatory Notes of the *Customs Cooperation Council* but only to supplement them, as is expressly stated in the notice preceding them. And the Explanatory Notes to the Customs Cooperation Council Nomenclature contain no clarification of the kind contained in those drawn up by the

Committee on Common Customs Tariff Nomenclature.

On consulting the latest updating supplement to those Notes, for subheading B I (a) 2 (aa) I found only the following comment:

"Clipped oats are grains which retain their husks or bract but have had their tips removed. As a result of the treatment effected, the husks can be removed from about 10% by weight of the grains."

I did not find there the new paragraph referred to by the Commission as having being approved on 27 October 1980 by the Committee on Common Customs Tariff Nomenclature. It seems to me therefore that that amendment, which was in any case effected after the events with which the national court is concerned, has not yet been published.

Consequently, the table of duties now in force and the Explanatory Notes drawn up by the Customs Cooperation Council, which are an authentic source for interpretation in the absence of specific provisions of Community law (paragraph 12 of the judgment cited above), do not undermine the view that the subheading in question cannot include oats whose tips have been unintentionally and incidentally broken off, in particular where the tips are still mixed with the grains.

Nor does that view conflict with the principle laid down by the Court in other cases, according to which, to ensure legal certainty and to facilitate the work of the administration, the classification of goods must be based on their objective characteristics and properties.

2. In such circumstances, the proportion of tips contained in the consignments in question does not seem to me to be of any consequence. It is not alleged that the consignments were deliberately made up as a mixture of clipped grains, grains bearing their tips and broken off tips.

If such were the case, it would be necessary to have recourse to the rules relating to mixtures. According to General Rule 3 (b): "Mixtures . . . shall be classified as if they consisted of the material . . . which gives the goods their essential character". In addition, it would be necessary to consult Additional Note 3 to Chapter 10 relating to mixtures of cereals.

3. As the plaintiff in the main proceedings states, the last question submitted to the Court is purely theoretical. In fact, the levy on hulled clipped oat grains is the same (23%) whether such hulling has merely removed the tips or has involved more extensive removal of the husk (pericarp).

As regards the remainder of the question, the "other" grains referred to in subdivision (bb) are clipped grains like the grains in subdivision (aa), but the more or less extensive hulling to which they have been subjected gives them a character different from that of grains which have merely been clipped. It might be thought that more of the pericarp is removed in the case of such "other" hulled grains than in the case of "hulled and clipped" grains.

4. In its written observations, the Commission suggests that the national court should be asked to provide samples of the products in question. The Court asked the Commission whether the

Committee on Common Customs Tariff nomenclature had itself studied samples before deciding to amend the Explanatory Note on subheading 11.02 B I (a) 2 (aa).

As is well known, that Committee, set up by Regulation No 97/69 of the Council of 16 January 1969 on measures to be taken for the uniform application of the Nomenclature of the Common Customs Tariff, is responsible in particular for settling technical questions arising in specific cases. It is clear that it is for that Committee in the first place to direct, if it is appropriate, that a technical examination be carried out and that it should give a decision only when all the facts are placed before it.

In response to the Court's question, the Commission indicated that the Netherlands representative on that Committee *was not in a position to submit such samples* to it and that the Committee did not itself consider that it was necessary to have such samples produced to it before it gave a decision. In the circumstances, it appears that the national court is itself unable to provide samples taken from the consignments involved and therefore I find it hard to perceive any proper basis for the question suggested.

In reply to the questions submitted, I propose that the Court rule as follows:

Under Community law as it stands at present, if oat grains are to be classified in heading 11.02 B I (a) 2 (aa), the removal of tips from the grains must be the result of hulling or some other processing and the broken-off tips and the grains still bearing their tips must have been removed from the consignments to be classified.